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FILED
MAR 1 2002
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No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2001

BILL LOCKYER, Attorney General of the State of California; ERNEST B. ROE, Warden, Petitioners-Appellees,

v.

LEANDRO ANDRADE, Respondent-Appellant

MOTION OF LEANDRO ANDRADE, RESPONDENT-APPELLANT, TO PROCEED *IN FORMA PAUPERIS*

The respondent, Leandro Andrade, asks leave to proceed *in forma pauperis* and to file the attached Brief in Opposition to Petition for Writ of Certiorari. Andrade is serving a sentence of 50 years to life in California prison. He filed a pro se habeas corpus petition in the United States District Court for the Central District of California. He filed a pro se appeal to the United States Court of Appeals for the Ninth Circuit. He was granted *in forma pauperis* status.

The Ninth Circuit, pursuant to 28 U.S.C. §1915(e)(1), appointed Erwin Chemerinsky to represent Andrade in briefing and arguing the case. Erwin Chemerinsky, a member of the Bar of this Court, has agreed to continue to represent Andrade, without charge, through the remainder of proceedings concerning this matter. No affidavit is attached because the United States Court of Appeals appointed counsel in this matter.

Respectfully submitted,
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22 pp

Certificate of Service

I, Erwin Chemerinsky, a member of the Bar of this Court, hereby certify that on the 26th day of February 2002, three copies of the **MOTION OF LEANDRO ANDRADE, RESPONDENT-APPELLANT, TO PROCEED *IN FORMA PAUPERIS*** were mailed, first class postage prepaid, to:

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BILL LOCKYER, Attorney General of the State of California; ERNEST B. ROE, Warden, Petitioners-Appellees,

v.

LEANDRO ANDRADE, Respondent-Appellant

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a sentence of 50 years to life in prison, with no possibility of parole for at least 50 years, grossly disproportionate in violation of the Eighth Amendment and a violation of clearly established law when it is applied for stealing videotapes worth $153.54?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Leandro Andrade hereby opposes the Petition for a Writ of Certiorari by Petitioner Bill Lockyer, Attorney General of the State of California, to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Respondent adopts and incorporates by reference all opinions and orders below that are set forth in Petitioner's Brief in Appendices A through F, at pages 2 through 81.

STATEMENT OF THE CASE

The facts are not in dispute in this matter. Appellant Leandro Andrade was convicted on two counts of petty theft with a prior conviction; each was for stealing videotapes worth less than $100 from a K-Mart. He was sentenced to 25 years to life in prison on each count, to be served consecutively. He is thus serving a sentence to 50 years to life in prison for his theft of videotapes. He is not eligible for consideration for parole until he serves at least 50 years, or until the year 2046. App. A, at 6.* Andrade was 37 years old at the time his sentence was imposed; he thus will not be eligible for parole until he is 87. App. A, at 28.

The first count was based on thefts that occurred on November 4, 1995, at the K-Mart store in Ontario, California. The store's Loss Prevention Officer observed Andrade steal five videotapes worth a combined value of $84.70. Andrade was

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*All citations to the Ninth Circuit's decision in this case are to the copy of it found in Appendix A filed by the petitioner.

stopped as he was leaving the store and the videotapes were taken from him. App. A, at 11.

The second count was based on thefts that occurred on November 18, 1995, at the K-Mart store in Montclair, California. The store's Loss Control Manager observed Andrade stealing videotapes. After being stopped, Andrade surrendered four videotapes with a combined value of $68.84. App. A, at 11.

Under California law, this generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998).

California law, however, provides that petty theft with a prior conviction is a felony offense. California Penal Code Ann. §666. Because Andrade had at least two prior convictions, his petty theft was prosecuted and convicted as a felony. Andrade's prior offenses that were considered by the state trial court were three counts of residential burglary committed on the same day in 1983, 13 years prior to the shoplifting that was the basis for the current convictions and sentence. App. D., at 59. As the Ninth Circuit noted, "All of [Andrade's prior] offenses were non-violent." App. A, at 32.

Under California's "three strikes" law, each act of shoplifting videotapes by Andrade was the basis for imposing a sentence of 25 years to life in prison. California Penal Code Ann. §667(e)(2)(A). Andrade is now serving two consecutive sentences of 25 years to life in prison, one for each act of

stealing videotapes. As the Ninth Circuit observed, "As a result, Andrade, a non-violent recidivist who twice shoplifted merchandise worth a total of $153.5, received a life sentence in prison with no possibility of parole for 50 years." App. A, at 6.

The California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment, finding that the sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. Appendix E. The California Supreme Court denied review. Appendix F.

Andrade then filed pro se a timely petition for habeas corpus pursuant to 28 U.S.C. §2254, which was denied. Andrade filed a pro se appeal to the denial to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit appointed counsel to brief and argue the case on Andrade's behalf and rendered its decision on November 2, 2001, finding that the sentence of 50 years to life in prison for shoplifting a small amount of merchandise was grossly disproportionate and violated the Eighth Amendment. The Ninth Circuit reversed the judgment of the district court and remanded the case with instructions to issue the writ of habeas corpus within 60 days following the issuance of the mandate unless the State resentences Andrade. App. A, at 43-44. The court then granted the State's motion to stay this mandate pending review by the Supreme Court.

REASONS THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR THE STATES AS TO WHETHER A SENTENCE OF 50 YEARS TO LIFE IN PRISON FOR MISDEMEANOR CONDUCT IS GROSSLY DISPROPORTIONATE IN VIOLATION OF THE EIGHTH AMENDMENT

The indeterminate life sentence imposed on Leandro Andrade for misdemeanor conduct, shoplifting a small amount of merchandise, is a result of laws that are unique to California. California essentially "double counts" the prior offenses. Under California law, Andrade's conduct generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998). Because of his prior offenses, Andrade's misdemeanor conduct, petty theft, is converted by statute into a felony, "petty theft with a prior conviction." California Penal Code Ann. §666. Then, under California's Three Strikes Law, that felony is used to impose a sentence of 25 years to life in prison on each count. In other words, the prior offenses are used twice: first to convert a misdemeanor into a felony and then to impose a life sentence based on it being a felony.

No other state in the country has such a sentencing scheme where misdemeanor conduct can be the basis for an indeterminate life sentence. See People v. Dozier, 93 Cal.Rptr. 600, 605-606 (2000) (a sentence under the Three Strikes law is, under California law, an "indeterminate life sentence.") As Justice Stevens noted: California is the "only state in the country in which a misdemeanor could receive such a severe sentence." Riggs v. California, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). The Ninth Circuit carefully reviewed the recidivist sentencing schemes throughout the country and concluded: "Of those jurisdictions with some form of recidivist sentencing statute, the State suggests only four where Andrade's triggering offense (petty theft with a prior) could qualify for recividist sentencing: Rhode Island, West Virginia, Texas, and Louisiana. Even in those four states, however, Andrade could not receive a sentence nearly as severe as he did under California's Three Strikes Law on the basis of his two prior strikes for residential burglary." App. A, at 35.

There is thus no conflict among the Circuits or among the states -- and no possibility of a conflict -- as to whether a sentence such as Andrade's violates the Eighth Amendment. Indeed, to the extent that other states previously allowed misdemeanor conduct to be the basis for a life sentence, this has been declared unconstitutional. For example, in People v. Gaskins, 923 F.2d 292 (Colo. App. 1996), the Colorado court found that it violates the United States Constitution to impose a life sentence for misdemeanor conduct, even if there have been prior felony convictions.

II. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT APPLIED CLEARLY ESTABLISHED LAW IN FINDING THAT A SENTENCE OF 50 YEARS TO LIFE IN PRISON FOR SHOPLIFTING A SMALL AMOUNT OF MERCHANDISE IS GROSSLY DISPROPORTIONATE IN VIOLATION OF THE EIGHTH AMENDMENT

The Ninth Circuit's decision was quite narrow. The court was clear that its "decision does not invalidate California's Three Strikes Law generally. Rather, we conclude that it is unconstitutional only as applied to Andrade because it imposes a sentence grossly disproportionate to his crimes." App. A., at 7." The Ninth Circuit's ruling is limited to the facts of this case, holding only that it violates the Eighth Amendment to sentence a person, who never has been convicted of a violent crime, to 50 years to life in prison for stealing $153 worth of videotapes.

The State's petition for certiorari argues that the law is uncertain as to whether grossly disproportionate punishments violate the Eighth Amendment in non-capital cases. Petition for Writ of Certiorari, at 7. However, the Ninth Circuit's decision rests on the firmly established principle that grossly disproportionate punishments violate the cruel and unusual punishment clause of the Eighth Amendment. In Weems v. United States, 217 U.S. 349, 371 (1910), this Court held that the Eighth Amendment prohibits "greatly disproportioned" sentences. On many other occasions, this Court has declared sentences unconstitutional as being "grossly disproportionate." In Solem v. Helm, 463 U.S. 277, 288 (1983), the Court observed that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments."

In Harmelin v. Michigan, 501 U.S. 957 (1991), seven Justices expressly recognized that grossly disproportionate sentences are unconstitutional. In Harmelin, Justice Scalia argued that the Eighth Amendment does not prohibit disproportionate sentences. Id. at 985. However, only Chief Justice Rehnquist joined this part of Justice Scalia's opinion.

Justice Kennedy, concurring in part and concurring in the judgment, expressly disagreed with Justice Scalia, and declared: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme

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"In its petition, the State of California suggests that review is appropriate because Andrade will unleash a floodgate of habeas petitions by California prisoners. Petition for a Writ of Certiorari, at 7 n.1. The State bases this entirely on newspaper stories about the Andrade decision.

The State's concern is unfounded. According to the most recent statistics from the California Department of Corrections, 340 people are incarcerated in California whose third strike was "petty theft with a prior." Department of Corrections, State of California, Data Analysis Unit, Estimates of Statistical Analysis Section, Offender Information Service Bureau, "Second and Third Strikes in the Institution Population By Offense Group and Admission of Return Status," September 10, 2001. Some of these individuals might be procedurally barred from seeking relief because of factors such as the statute of limitations on bringing habeas corpus petitions, the bar on successive petitions, and exhaustion requirements. Thus, although accepting Appellants position undoubtedly would benefit some other prisoners, this is not likely to be a large number.

Nor is there reason to believe that Andrade will increase habeas petitions by those convicted of other crimes. The reality is that prisoners already are filing such petitions and there is no indication that Andrade, which is limited to its facts, will in any way increase their numbers.

sentences that are 'grossly' disproportionate to the crime." Id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Justices O'Connor and Souter joined this opinion and its conclusion that grossly disproportionate punishments are unconstitutional. The four dissenting Justices in Harmelin, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and contended that "gross disproportionality" was too restrictive a constitutional standard. Id. at 1009, 1012 (White, J., dissenting); id. at 1027 (Marshall, J., dissenting).

No decision since Harmelin has questioned the principle established by almost a century of Eighth Amendment decisions: grossly disproportionate punishments are cruel and unusual punishment in violation of the Eighth Amendment. In fact, in United States v. Bajakajian, 524 U.S. 321, 336 (1998), this Court, in invalidating a forfeiture as violating the Eighth Amendment, stated: "[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clauses precedents."

Simply put, if any sentence is "grossly disproportionate," it is an indeterminate life sentence, with no possibility of parole for 50 years, for stealing $153 worth of videotapes. The Ninth Circuit followed this Court's command that proportionality is to be determined by "objective factors to the maximum extent possible." Rummel v. Estelle, 445 U.S. 263, 274-275 (1980). Specifically, the Ninth Circuit expressly applied the test articulated by this Court in Solem v. Helm, 463 U.S. 277, 292 (1983): "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Under this test, the Ninth Circuit properly found that an indeterminate life sentence imposed on Andrade for shoplifting violates the Eighth Amendment. First, the Court compared the gravity of the offense and the harshness of the punishment. The offenses were minor, petty theft, but the punishment was enormous: a sentence of 50 years to life in prison. Andrade's crimes were neither violent nor in any way dangerous; indeed, Andrade never has been convicted of any violent crime. App. A., at 6. In fact, the stolen items were recovered at the time of the shoplifting and there was no loss to the stores. The total value of the stolen items was well below the dividing line distinguishing petty theft from grand theft. This is different, for example, from Harmelin v. Michigan where Justice Kennedy emphasized that the offense, possession of 650 grams of cocaine, "threatened to cause great harm to society" because it could "yield . . . between 32,650 and 65,000 doses" of a drug that threatened "the health and welfare of our population." Harmelin v. Michigan, 501 U.S. at 1002.

Moreover, in assessing the gravity of the punishment, the

Ninth Circuit stressed that "[u]nlike most sentences imposed under California's sentencing laws, Andrade's minimum three-strikes term may not be reduced by credit for good behavior or working while in prison. Andrade therefore must serve a minimum of 50 years in prison before he is eligible for parole." App. A, at 28. The Ninth Circuit explained that the unavailability of parole for at least 50 years makes the punishment substantially more severe than the sentence at issue in Rummel because there the defendant was eligible for parole in as few as 12 years. App. A., at 28.

The Ninth Circuit then properly applied the second factor from the Solem test: the sentences imposed on others in the same jurisdiction for similar offenses. Under California law, Andrade's crimes constituted petty theft, a misdemeanor punishable by a fine or a jail sentence of six months or less. California Penal Code Ann. §490 (West Supp. 1998). The court emphasized that "it is significant that the core conduct for which Andrade was sentenced is, in the first instance, classified as a misdemeanor rather than a felony." App. A, at 30. Indeed, the Ninth Circuit noted that "Andrade's indeterminate sentence of 50 years to life is exceeded in California only by first-degree murder and a select few violent crimes." App. A, at 33.

Finally, the Ninth Circuit applied the third Solem factor in evaluating gross disproportionality: the sentences imposed in other jurisdictions. As explained above, California is the only state in which misdemeanor shoplifting could lead to an

indeterminate life sentence with no possibility of parole for 50 years. The Ninth Circuit reviewed the other states and concluded "only in Louisiana is it possible for Andrade to receive a comparable sentence. Even then, the sentence would be vulnerable to a challenge under the Louisiana constitution." App. A, at 36. The Ninth Circuit noted that the fact that Andrade could receive such a sentence at most in only one other state supports its conclusion that the punishment was grossly disproportionate.

The State in its petition for certiorari emphasizes that the government has the constitutional authority to punish recidivists harshly. This is true, but this Court never has approved such harsh sentences for misdemeanor conduct, even when the offender is a recidivist. The distinction between misdemeanors and felonies is deeply embedded in the law. The Supreme Court recently recognized the fundamental historical difference between felony and misdemeanor conduct. In Apprendi v. New Jersey, 120 S.Ct. 2348, 2357 n.7 (2000), the Court observed that "[t]he common law punishment for misdemeanors -- those smaller faults, and omissions of less consequence" did not include prison sentences. The Court stated that "[a]ctual sentences of imprisonment for such offenses, however, were rare at common law until the 18th century for 'the idea of prison as a punishment would have seemed an absurd expense.'" Id. at 2357 n.7 (citations omitted).

In Rummel v. Estelle, this Court repeatedly emphasized that it was considering permissible punishment for felony conduct.

See 445 U.S. at 274, 278, 284. In fact, the Court stressed the "line dividing felony theft from petty larceny." Id. at 284. Rummel involved felony theft, while these cases concern what California deems to be petty theft.

Justice Stevens recently explained the importance of this distinction: "While this Court has traditionally accorded to state legislatures considerable (but not unlimited deference) to determine the length of sentences 'for crimes concededly classified and classifiable as felonies,' petty theft does not fall into that category." Riggs v. California, 525 U.S. at 1114 (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). Indeed, Justice Stevens said that punishing petty theft with a prior conviction by imposing a life sentence is closely analogous to the punishment declared unconstitutional in Solem: "[P]etty theft has many characteristics in common with the crime for which we invalidated a life sentence in Solem, uttering a 'no account' check for $100. 'It involves neither violence nor (the) threat of violence to any person'; the amount of money involved is relatively small; and the State treats the crime as a felony (here, only under some circumstances) pursuant to a quirk in state law." Id. at 1114 (citations omitted).

In Harmelin v. Michigan, Justice Scalia, joined only by Chief Justice Rehnquist, recognized the possibility of "extreme examples" of very harsh punishments for relatively trivial offenses, but said that "they are certain never to occur." 501 U.S. at 985-986. But that is exactly what occurred in this case: Leandro Andrade was sentenced to life imprisonment for shoplifting.

The State in its petition for certiorari repeatedly emphasizes that the California legislature and the voters of California through an initiative approved the Three Strikes law. Petition for Writ of Certiorari, at 12-13. But there is no limit to the State's argument. Under its reasoning, any punishment approved by the legislatures and the voters for any crime, no matter how trivial, would be constitutionally permissible. Under the State's position, the government could, if it chose, impose a life sentence for a traffic ticket, jaywalking, littering, or literally any offense no matter how trivial. This is inconsistent with almost a century of decisions from this Court that grossly disproportionate punishments violate the Eighth Amendment.

The Ninth Circuit's decision is very narrow. It applies well established law and finds only that California's Three Strikes law is unconstitutional as applied to this defendant who received the extraordinary sentence of 50 years to life in prison for stealing $153 worth of videotapes.

III. THE SENTENCE OF 50 YEARS TO LIFE IN PRISON IMPOSED ON LEANDRO ANDRADE VIOLATES CLEARLY ESTABLISHED CONSTITUTIONAL PRINCIPLES AND THUS RELIEF IS APPROPRIATE UNDER A WRIT OF HABEAS CORPUS

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant relief is the state court's

decision is "contrary to, or involves an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1). This Court has stated that the standard for relief is whether the sentence is "contrary to . . . clearly established federal law, as determined by the Supreme Court of the United States" or that it was an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Williams v. Taylor, 120 S.Ct. 1495, 1423 (2000). The Ninth Circuit expressly relied on the standard set out in Williams v. Taylor and quoted at length from Justice O'Connor's opinion. App. A, at 18-19.

The Ninth Circuit granted relief because its review of the this Court's decisions in Rummel, Solem, and Harmelin "demonstrates that the law governing the application of the Eighth Amendment to non-violent offenders sentenced to life imprisonment was clearly established at the time of the California Court of Appeal's 1997 decision in this case." App. A, at 41. The Ninth Circuit noted that the California Court of Appeal failed to apply the test adopted by this Court in Solem v. Helm and supported by seven members of this Court in Harmelin v. Michigan. The Ninth Circuit found that the state court's "disregard for Solem results in an unreasonable application of clearly established Supreme Court law." App. A, at 42

Thus, the Ninth Circuit applied clearly established law -- that grossly disproportionate punishments violate the Eighth Amendment -- to conclude that sentence a person for 50 years to life in prison for shoplifting $153 worth of merchandise is unconstitutional. This is completely in accord with when federal courts may grant relief under the habeas corpus statute."[***] This case presents no new issues with regard to the habeas corpus statute or how it should be interpreted and applied.

Conclusion

For the foregoing reasons, respondent Leandro Andrade urges this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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[***]The state in its petition for certiorari also raises an issue concerning the appropriate methodology for habeas corpus review. Petition for Writ of Certiorari, at 20. However, the state never explains why the choice of methodology would matter at all in this case. The Ninth Circuit found that the sentence imposed on Andrade, 50 years to life in prison, was contrary to clearly established law. This is exactly the test prescribed in the statute and elaborated upon in Williams v. Taylor and Penry v. Johnson. [illegible]

Certificate of Service

I, Erwin Chemerinsky, a member of the Bar of this Court, hereby certify that on the 26th day of February 2002, three copies of the Brief in Opposition to Petition for Writ of Certiorari, were mailed, first class postage prepaid, to:

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